92-1129

Supreme Court, U.S.
FILED
DEC 28 1992
OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PAUL S. CHENG,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December 28, 1992

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

QUESTIONS PRESENTED

I. Whether, in light of this Court's decisions in *Schaffer v. United States*, *Dunn v. United States*, and *In re Winship*, multiple convictions for the interstate transportation of funds obtained by fraud may stand where the Fifth Circuit allowed the government to aggregate the evidence in order to prove an essential element of each of the charged offenses, but separate the charges for the purposes of conviction and punishment.

II. Whether the Fifth Circuit's conclusion that a jury could reasonably infer Cheng's criminal intent and causation of the transfers from his purported oversight of business affairs of the company and general awareness of the stock purchases underlying the transfers can stand as a matter of law, where the inference is contradicted by the undisputed evidence that Cheng did *not* know the method of funding of the stock purchases or cause the transfers, and where such an inference results in the imposition of vicarious criminal liability and an ex post facto application of the interstate transportation of stolen property statute.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings below are:

United States of America
Paul Sau-Ki Cheng
Simon Edward Heath

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Paul S. Cheng respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit, *United States v. Heath*, is reported at 970 F.2d 1397 (5th Cir. 1992). 1-19a.[1] A supplemental opinion issued by the Court denying the petition for panel rehearing is reported at 1992 WL 338020 (5th Cir. Nov. 19, 1992). 22-23a.

JURISDICTION

The jurisdiction of the Court is timely invoked under 28 U.S.C. § 1254(1). The Fifth Circuit entered its judgment on

[1] "___a." refers to the appendix to this petition for a writ of certiorari.

August 20, 1992. 1-19a. The Fifth Circuit denied petitioner's petition for panel rehearing and suggestion for rehearing en banc on September 29, 1992. 20-21a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. Amend. V. Article I, Section Nine of the United States Constitution holds that "[n]o ex post facto law shall be passed." U.S. Const. Art. I, § 9. The relevant statutory provision, 18 U.S.C. § 2314, states,

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years or both.

18 U.S.C. § 2314 (1970 & Supp. 1992).

STATEMENT OF THE CASE

This appeal involves Cheng's four convictions under the National Stolen Property Act, codified at 18 U.S.C. § 2314, for the interstate transportation of funds allegedly obtained by fraud. Cheng was charged with ten counts of interstate transportation of funds, but was acquitted on five counts and the jury hung on one count.[2] In order to sustain a conviction under § 2314, the government must prove that: (1) the funds were valued at $5,000 or more; (2) the defendant transported or

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[2] Specifically, the jury convicted Cheng on Counts 9, 10, 12, and 14; acquitted him on Counts 8, 11, 13, 15, 17; and hung as to Count 16.

caused the funds to be transported in interstate or foreign commerce; and (3) the defendant acted knowingly and willfully. At trial and on appeal, Cheng argued, *inter alia*, that the government could not — and did not — prove beyond a reasonable doubt that the transferred funds were those allegedly obtained by fraud unless the government aggregated the proof for all counts and then applied that aggregated proof to each individual count. Cheng also argued that there was no evidence that he knew or caused the funds to be transported in interstate commerce.

COURSE OF PROCEEDINGS

On August 15, 1990, a jury in the Northern District of Texas acquitted co-defendants Paul Cheng and Ed Heath on four counts of interstate transportation of fraudulent funds; convicted them on two counts of bank fraud, one count of wire fraud, one count of misapplication, two counts of false entry, and four counts of interstate transportation; and failed to reach a verdict on the conspiracy count and one count of interstate transportation. The jury also acquitted Cheng on one count of interstate transportation, on which it convicted Heath. On January 17, 1991, the district court, the Honorable Robert B. Maloney presiding, sentenced Cheng to a total of thirty years of imprisonment, and Heath to twenty years, and ordered restitution. As to the § 2314 counts, Cheng was sentenced to ten years per count, with the sentences on the last three counts to run concurrently to that on the first § 2314 count, resulting in ten years' imprisonment on the § 2314 counts. Cheng and Heath appealed their convictions, properly invoking the Fifth Circuit's jurisdiction pursuant to 28 U.S.C. § 1291.

On August 20, 1992, a panel of the Fifth Circuit ordered the vacatur of the conviction on one count of bank fraud as multiplicitous, remanding for resentencing on the remaining count of bank fraud, and affirmed the remaining convictions. On September 29, 1992, the Fifth Circuit denied Cheng's peti-

tion for rehearing and suggestion for rehearing *en banc*. On November 19, 1992, the Fifth Circuit *sua sponte* supplemented its denial of Cheng's petition for panel rehearing, addressing Cheng's contention that the district court had constructively amended the indictment by giving a jury instruction that would permit the jury to convict Cheng on the basis of an affiliation with the savings-and-loan not charged in the indictment.

FACTUAL BACKGROUND

Cheng and Heath were founders of a successful real estate development company, Pacific Realty Corporation ("PRC"), that subsequently acquired a Texas thrift, Guaranty Federal Savings and Loan Association ("GFSL"). 2a. In 1985, PRC, then a subsidiary of GFSL, sold a piece of property, "Ponte Vedra," in an exclusive Florida beach area to an Arizona developer, Don Farris. 2a.; S.R.27:126,144-47;28:39.[3] GFSL loaned Farris funds to purchase Ponte Vedra, and assisted him in its financing by having PRC purchase from him a valuable tract in Phoenix, thereby providing Farris with funds to establish an interest reserve for the Ponte Vedra loan. 2a.

Ben Romero, an officer of PRC, was assigned to obtain an appraisal on Ponte Vedra. 3a. In carrying out this task, and without Cheng's or Heath's knowledge, Romero gave false information to the appraisers regarding the height and design of the planned buildings — stating that the buildings would be built as twin highrise towers.[4] S.R.24:77. The appraisers initially

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[3] This citation refers to Transcript Volume 27 at pages 126, 144-47. The record below is cited in accordance with the format employed in the Fifth Circuit, and will be employed in this petition to refer to transcript citations.

[4] The Fifth Circuit's rendition of the facts are fashioned in such a way as to lead the reader to the inexorable conclusion that Cheng and Heath were undoubtedly guilty of the alleged fraud. That conclusion, however, rests upon a statement of facts that distorts the record below. For example, two especially crucial facts are omitted from the Fifth Circuit's statement of facts.

balked at issuing the appraisal at the value requested by Romero, because the number of units contained in the highrise towers would not support the valuation. *See* 3a. They ultimately issued the appraisal, based not on the highrise plan, but instead based on Romero's false representation that the zoning regulations governing the permissible density of units would allow the number of units necessary to meet the desired value. 3-4a. The appraiser testified at trial that, although he had certified to the contrary in the appraisal, he knew that the zoning regulations would not permit the building of the necessary number of units.[5] S.R.15:108-46.

After the Ponte Vedra transaction, as part of a long-term diversification plan, for which PRC chief financial officer Ralph Kuhns was hired to implement, PRC purchased stock in a national chain of motor inns. S.R.11:59-70. Kuhns chose, without Cheng's knowledge, to fund the purchases from an account that held the Ponte Vedra proceeds. S.R.11:53. Appellants' interstate transportation convictions arise from the wire transfers made to complete these stock purchases.

First, the Fifth Circuit makes no mention of the unwavering testimony of Ben Romero, the PRC vice-president who admitted to giving the false information to support the appraisal. Romero testified both before the grand jury and at trial that Cheng and Heath had *no* involvement whatsoever in the process of obtaining the false appraisal. S.R.23:94-5; 24:68; 24:82. Second, the only evidence linking Cheng and Heath with the fraudulent appraisal, the core of all their convictions, was that of a witness, Connie Elfenbein, whose story changed and became more inculpatory with each official rendition. At trial, Elfenbein testified to a purported meeting between Cheng, Heath, and Romero about the appraisal, S.R.12:123;13:64, a meeting (1) whose occurrence the evidence showed was physically impossible because Heath was away on business, (2) which the participants denied having occurred, and (3) to which no other person could testify had occurred. The lengths to which the Fifth Circuit went in order to uphold the convictions underscores the difficulty of a savings-and-loan defendant in getting a fair hearing in this climate.

[5] The government chose not to indict the appraisers in this case.

As to these transfers, there was no direct evidence either that Cheng caused the transfers to be made from the account containing the tainted funds, or that he even knew of these transfers. *See* 9a. Rather, the defense proved at trial that (1) Kuhns, PRC's chief financial officer, *not* Cheng, had sole control and responsibility for choosing the funding source of the transfers, S.R.11:53; (2) Kuhns had three accounts from which to choose, which allowed access to millions in untainted funds, S.R.28:75; (3) Cheng's signature did not appear on any of the paperwork involving the wire transfers, S.R.11:59-70; and (4) Cheng had no involvement in or knowledge that the transfers had occurred, much less the source of those funds.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE FIFTH CIRCUIT'S AFFIRMANCE OF CHENG'S FOUR CONVICTIONS UNDER 18 U.S.C. § 2314, ON A THEORY OF AGGREGATION OF PROOF FOR SEPARATELY-CHARGED COUNTS, HEIGHTENS THE CONFLICT AMONG THE CIRCUITS AS TO THE PERMISSIBILITY AND METHOD OF AGGREGATING PROOF UNDER § 2314.

In order to uphold Paul Cheng's convictions on four counts of interstate transportation of fraudulently-obtained funds under 18 U.S.C. § 2314,[6] the Fifth Circuit relied upon a theory of aggregation of proof that other Circuits have rejected as an

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[6] 18 U.S.C. § 2314 reads, in pertinent part,

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years or both.

18 U.S.C. § 2314 (1970 & Supp. 1992).

impermissible application of this Court's decision in *Schaffer v. United States*, 362 U.S. 511 (1960). The Fifth Circuit aggregated the proof as to ten counts of § 2314 in order to prove the fraudulent nature of the transported funds in each separately-charged count. 7-9a. The Fifth Circuit agreed that the government could *not* prove that the funds in *each* of the separately-charged transfers were funds derived from allegedly fraudulent activities — an essential element of *each* of the ten § 2314 counts. 9a. Despite this lack of proof, the Fifth Circuit *upheld* Cheng's four convictions under § 2314, stating, "We are satisfied that, having proved beyond a reasonable doubt that the *aggregate* taken from the account exceeded the amount of clean funds available, the Government met its burden."[7] *Id.* (emphasis added). The Fifth Circuit's aggregation of proof for ten *separately-charged* offenses relieved the government from having to prove an essential element of § 2314 as to *each* separately-charged offense — conflicting with well-settled precedent of other circuit courts and the Supreme Court.

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[7] The Fifth Circuit distinguished two of its previous decisions addressing similar proof problems in § 2314 cases: *United States v. Poole*, 557 F.2d 531 (5th Cir. 1977), and *United States v. Levy*, 579 F.2d 1332 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979). In *Poole*, the Fifth Circuit reversed the convictions under § 2314 because the defendant's account contained sufficient other, legitimate funds to cover the transfers, and, therefore, the government did not prove that each transfer contained fraudulently-obtained funds. 557 F.2d at 535-36. In *Levy*, there was no doubt that insufficient clean funds existed in the account to cover each of the transfers. 579 F.2d at 1336-37. In contrast, in the instant case, the panel admitted that the government could *not* trace each transfer to tainted funds, because sufficient clean funds existed to cover each transfer. The Fifth Circuit's ability to distinguish *Poole* and *Levy* from the facts of the instant case hinged upon the notion, challenged here, that the wire transfers may be aggregated for the purposes of proof, rather than treating them as separately-charged counts.

A. The Fifth Circuit's Decision Creates a Conflict Among the Circuits in Their Application of the Schaffer Aggregation Principle in § 2314 Cases.

The Fifth Circuit's decision in Cheng's case is a wide departure from other Circuits' application of the aggregation principle first announced in *Schaffer v. United States*, 362 U.S. 511 (1960). In *Schaffer*, this Court held that, in cases where individual shipments of goods amounted to a value less than the jurisdictional limit of $5,000 in § 2314, the government could permissibly aggregate the value of separate shipments in a single count in order to satisfy this limit "where the shipments have enough relationship so that they may properly be charged as a single offense."[8] Courts interpreting *Schaffer* have, until recently, consistently applied its aggregation principle in § 2314 cases[9] — and others dismissing indictments where separate counts have charged less than the jurisdictional amounts,[10] and uphold-

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[8] The *Schaffer* defendants were charged with three counts of interstate transportation of stolen property, each count covering multiple shipments over a several-month period. 362 U.S. at 513, 518-19. The Court found that, within each count, shipments occurring over a several-month period were properly aggregated. *Id.* at 517-18.

[9] Typically, the aggregation principle is applied to the issue of the jurisdictional amount of $5,000 delimited by § 2314. *See, e.g., United States v. Drebin*, 557 F.2d 1316, 1328 n.19 (9th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978) ("value of the [bootleg] films in each count could properly be aggregated to satisfy the $5,000 requirement, since their transportation was charged as a single offense"). However, the aggregation principle has been applied in non-§ 2314 cases as well. For example, in *United States v. Tutino*, 883 F.2d 1125, 1141 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081, 1082 (1990), the court held that two heroin sales were properly aggregated in one count under *Schaffer* because they were part of a single continuing scheme to defraud.

[10] *E.g., United States v. Markus*, 555 F. Supp. 375 (D.N.J. 1983), *aff'd*, 721 F.2d 442 (3d Cir. 1983) (twenty-count indictment dismissed where none of checks exceeded $5,000 statutory limit).

ing convictions where one count properly charged multiple, related shipments.[11]

The circuit courts' faithful adherence to *Schaffer* is well-illustrated by the Eighth Circuit's decision in *United States v. Lagerquist*, 724 F.2d 693 (1984), reversing five convictions and dismissing the indictment charging five violations of § 2314 for the transportation of five checks in interstate commerce, because each check had a value of less than $ 5,000. There, the court stated,

> As none of the individual checks satisfied the $5,000 requirement of section 2314, the government sought to aggregate the value of the checks. This is an acceptable procedure provided the separate transactions that give rise to liability are substantially related, and that they are "charged as a single offense." . . . In this case, although Lagerquist transported five checks with a combined value in excess of $5,000, none of the counts standing alone satisfied the jurisdictional amount required in 18 U.S.C. § 2314. Accordingly we hold that the district court lacked jurisdiction to entertain this suit.

Id. at 694-95 (quoting *Schaffer v. United States*, 362 U.S. at 517); *see also United States v. Honey*, 680 F.2d 1228 (8th Cir. 1982) ("[T]here was sufficient relationship in the three transactions here involved to warrant their inclusion in a single count and that their value could properly be aggregated in reaching the jurisdictional amount."). Because the government charged the

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[11] *E.g., United States v. Martin*, 800 F.2d 560 (6th Cir. 1986) (two bank checks sent within eight days of each other from same account to same person properly charged in one § 2314 count); *United States v. Smith*, 692 F.2d 658 (10th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983) (upholding aggregation of value of items of stolen property charged in one § 2314 count).

defendants with ten separate counts of § 2314, the Fifth Circuit improperly aggregated the proof.[12]

The conflict among the circuits highlighted by the *Cheng* decision was foreshadowed by the Ninth Circuit's decision in *United States v. Carter*, 804 F.2d 508 (9th Cir. 1986). There, "the government divided 124 shipments of stolen record albums into five counts which each include a series of related transactions and which each meet the jurisdictional amount. While all the shipments are part of one overall scheme, the government is not limited to charging only one count of violating § 2314." *Id.* at 511. In dissent, Judge Reinhardt argued that *Schaffer* required that, "once having combined a series of shipments into a single count on the basis of some logical relationship among them, the government must combine *all* shipments having that same relationship." *Id.* at 520 (emphasis in original). Judge Reinhardt concluded that, therefore, the government could have properly charged only two counts — all shipments to Boston in one count and all shipments to Chicago in a separate count. *Id.*

The *Cheng* court (and arguably the *Carter* court) creates a split in the circuits by running afoul of the *Schaffer* principle in permitting *both* (1) the aggregation of funds for the purpose of proving that, for *each* of ten separately-charged counts, the funds transported in interstate commerce were those funds allegedly obtained by fraud, and (2) the conviction and punishment for more than one § 2314 offense on the basis of aggregated proof.[13] In *Cheng*, there were ten wire transfers from an account

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[12] As in *Lagerquist*, none of the § 2314 counts in Cheng's indictment incorporated by reference any of the other § 2314 counts, as allowed by Fed. R. Cr. Pr. 7(c)(1). Therefore, "'[b]ecause the government chose not to utilize this method of aggregation in the indictment, it is not now available * * * on appeal.'" *Lagerquist*, 724 F.2d at 695 n.5 (quoting *United States v. Markus*, 721 F.2d 442, 444 (3d Cir. 1983)).

[13] The issue addressed by the *Cheng* court is that left open in the district court's opinion in *Honey*:

that contained so-called "tainted" funds commingled with untainted funds. Each wire transfer was in an amount less than the total amount of clean funds in the account. During argument on the motion for judgment of acquittal and in their appellate briefs, Cheng and his co-defendant argued that the government could not prove beyond a reasonable doubt that each transfer contained tainted funds.[14] Cheng further noted that the government's argument (and ultimately the court's ruling) presupposed that, as to each transfer, clean funds had already been exhausted, leaving only tainted funds for that transfer. While such a supposition might be acceptable in civil forfeiture cases,[15] Cheng argued that, in a criminal case where the burden of proof rests squarely upon the government, such an assumption gives

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If the United States Attorney here had chosen to prosecute Mr. Honey for the three shipments (each of a value under $5,000) in three separate counts of the indictment, another question would arise: if the value of the property in each of the three counts could be aggregated for the purpose of reaching the $5,000 jurisdictional amount (because under section 2311 said property was referred to "in a single indictment"), would it be proper to permit that person to be convicted of three separate crimes under section 2314 with the possibility of a three-fold increase in the sentence? As indicated, we do not need to answer this question because the prosecutor aggregated the three shipments within *one count* of the indictment and, therefore, Mr. Honey has been convicted of only one crime and must be sentenced accordingly.

542 F. Supp. 129, 134 (D. Ark. 1981).

[14] In Cheng's case, the government had the choice of charging the § 2314 counts under the wire fraud statute, 18 U.S.C. § 1343. To the extent that the government cannot charge the transportations under another criminal statute, and the requirement of proving the transportation of commingled funds borders on the impossible for the government, this problem is one to be addressed by Congress, and not one to be addressed by the courts via judicial reconstruction.

[15] *See, e.g., United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1160 (2d Cir. 1986) (discussed *infra* at 12).

to the government, rather than to the defendant, the benefit of the doubt as to whether the funds were actually tainted.[16]

In Cheng's case, the Fifth Circuit relied on *Banco Cafetero*, 797 F.2d at 1158, for the proposition that the government could not trace the tainted funds to each transfer because "money is fungible." 9a. In *Banco Cafetero*, the Second Circuit found that, in a civil forfeiture proceeding, the defendants' assets — bank deposits — were not immune from forfeiture where the funds were commingled with clean funds in the bank account. The court accepted the government's position, which relied upon accounting principles similar to those advanced by the government in the instant case, stating that "the Government's position is sufficiently correct to enable it to prevail on this appeal." *Id.* at 1159.

However, in reaching this conclusion, the court emphasized that, in forfeiture cases, Congress explicitly placed *on the defendant* the risk of uncertainty created by the need to trace tainted funds commingled with clean funds:

> Obviously few cases will present facts that neatly match untainted deposits with withdrawals, and the real question therefore becomes which side bears the risk of the inevitable uncertainty that will arise in most

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[16] The government's difficulties in proving the § 2314 counts arose, in part, from the nature of the "stolen property" in the instant case — money deposited into a bank account and later transferred by wire. Section 2314 is obviously much more easily applied to the more typical case of stolen goods transported by motor vehicle across state lines. Indeed, one wonders why the government did not charge the ten transfers under the more logical of available statutes, the wire fraud statute, 18 U.S.C. § 1343. Perhaps the prosecutors chose to charge under § 2314 because of the ten-year exposure per count (rather than the five-year exposure under § 1343) or because of the lack of evidence connecting the wire transfers with the alleged scheme to defraud. Whatever the reason, the government should not be permitted to multiply charges in order to increase a defendant's exposure, without also being required to prove each element of every charged offense.

> cases. Congress has answered that question in the Government's favor by assigning it a lenient burden of proof in obtaining forfeiture of 'traceable proceeds' of drug transactions.

Id. at 1160. Thus, the government need only satisfy a probable cause standard to establish a *prima facie* case for forfeiture in drug cases. *Id.* In stark contrast, in Cheng's case a probable cause quantum of evidence simply has no application in satisfying the elements of a § 2314 offense — the government *must* prove each element *beyond a reasonable doubt. See In re Winship*, 397 U.S. 358, 363 (1970), discussed at § B. *infra.* Had the Second Circuit been the appellate court deciding *Cheng*, it undoubtedly would reject both the government's theories and the Fifth Circuit's aggregation theory because of the heightened burden of proof in § 2314 offenses.

This Court now has before it an issue ripe for resolution — that of the circuit courts' split on the bounds of the *Schaffer* limiting principles. This principle, as articulated in the *Schaffer* opinion, should be easily and uniformly applied by the lower courts for all elements of § 2314 and other statutory provisions that are subject to aggregation. However, some courts are now interpreting *Schaffer* in ways that obliterate its meaning. Most important, without this Court's intervention, the circuit courts will continue inconsistently to convict defendants depending upon the court's particular view of the bounds of permissible aggregation under *Schaffer.*

Clarification by this Court is especially important now because of the variety of cases to which the aggregation principle is being applied — for example, cases requiring the tracing of funds, like Cheng, and drug cases that provide for very serious sentences, even for first time offenders, *see, e.g., Tutino*, 883 F.2d at 1141 (discussed in note nine above). In short, the time is ripe for this Court to rule definitively that, under *Schaffer*, aggregation of proof — whatever the element, whatever the

statute — is permissible if, and only if, the transportations are sufficiently related to be properly joined in one offense, *and* if the offenses are charged in one offense.

B. The Fifth Circuit's Decision to Allow Aggregation of Proof for Separately-Charged Offenses Violates This Court's Decisions in *Dunn v. United States* and *In re Winship*.

A decision by this Court to allow aggregation for the purposes of proof, but separation of charges for the purposes of conviction and punishment, would condone a violation of fundamental principles of constitutional criminal procedure — that the government must prove beyond a reasonable doubt *every* essential element of *each* charged offense, *see, e.g., In re Winship*, 397 U.S. 358, 363 (1970)); *Patterson v. New York*, 432 U.S. 197, 210 (1977); *and* that each count be treated as if charged in a separate indictment. *Dunn v. United States*, 284 U.S. 390, 393 (1932).

In *Dunn*, the defendant argued that he could not consistently have been acquitted on two counts but convicted on a third count where the evidence was identical as to all three counts, and that therefore his conviction should be reversed. This Court disagreed, finding that, because each count is to be considered as if separately charged, consistency in a verdict is not necessary.[17] *Id.* The Court further stated,

> 'The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they

[17] The Court noted that if the counts upon which Dunn was acquitted were charged in separate indictments and tried first, Dunn could not have argued a res judicata effect in a subsequent trial on the remaining count. *Id.* at 393.

> had no right to exercise, but to which they were disposed through lenity.' . . . That the verdict may have been the result of compromise, or of a mistake on the part of the jury is possible. But verdicts cannot be upset by speculation or inquiry into such matters.

Id. at 393-94 (quoting *Steckler v. United States*, 7 F.2d 59, 60 (2d Cir. 1925)).

It cannot be gainsaid that an essential element of a § 2314 offense is that the funds transported in interstate commerce be stolen, converted, or taken by fraud. *See, e.g., United States v. Freeman*, 619 F.2d 1112, 1118 (5th Cir. 1980), *cert. denied*, 450 U.S. 910 (1981). In Cheng's case, the Fifth Circuit conceded that the government could *not* satisfy this element as to the individual transfers, 9a., but then upheld the appellants' multiple convictions on an aggregation of proof theory, stating, "It defies logic to require that the Government trace these tainted funds through each transfer. Such proof is impossible because money is fungible. . . . The impossibility of such proof, however, does not render the convictions invalid." *Id.* Such an aggregation of proof would have been permissible *only* if Cheng had been charged with one count of violating § 2314. Because he was charged and tried on ten counts, the Fifth Circuit's decision cannot stand in light of the principles delimited in *Dunn* and *Winship*.[18]

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[18] Cheng argued in his rehearing requests that the Fifth Circuit panel erred in declaring that the fungible nature of money renders proof impossible. Reh. Br. at 8-9. Cheng demonstrated that the Fifth Circuit's respective analyses in *United States v. Poole* and *United States v. Levy* did not find controlling the fungible nature of money. The prosecutors in *Levy* were able to prove that the transferred funds were tainted despite the fungibility of money; thus, the Fifth Circuit upheld the convictions. 579 F.2d at 1336-37. The prosecutors in *Poole* could not; the Fifth Circuit reversed Poole's convictions. 557 F.2d at 535-36. In Cheng's case, the impossibility was not one of *logic*, but of proof — a direct result of the government's charging strategy.

In complete disregard of the *Dunn* and *Winship* principles, to sustain a savings-and-loan conviction, the Fifth Circuit allowed the evidence for the transfers to be aggregated to satisfy the proof requirements as to ten *separately-charged* transfers because the court recognized the obvious — that the proof failed as to each of the separate transfers.[19] 9a. Such an approach permitted the Fifth Circuit to dodge other, equally problematic issues such as the government's urging that the court apply a "first-in, first-out" or "lowest intermediate average balance" method to determine whether tainted or untainted funds were transferred.[20] However, the Fifth Circuit's approach conflicts with this Court's admonition that "each count in an indictment is regarded as if separately charged." *Dunn*, 284 U.S. at 393.

This Court should not countenance the Fifth Circuit's treatment of the § 2314 charges as one count for the purposes of proving an essential element of the offense, but as *separate* counts for the purposes of determining the number of convictions and sentencing.[21] The government could not prove that the

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[19] In doing so, however, the Fifth Circuit *de facto* constructively amended the indictment for the purposes of proof as to the funds' illegal character, which should have been grounds for *per se* reversal. *See, e.g., United States v. Mize*, 756 F.2d 353, 355 (5th Cir. 1985), *cert. denied*, 484 U.S. 943 (1987) (reversal "automatic" where jury "permitted to convict the defendant on a factual basis that effectively modified an essential element of the offenses charged"). Not surprisingly, the Fifth Circuit does not cite to any authority for its novel holding.

[20] The court may have avoided these methods because of the wild speculation about the jury's verdicts on the § 2314 counts the government was required to engage in in order to justify these methods. *See* G. Br. at 18-19. The jury's verdict does not support the government's argument, however, because the jury convicted Cheng of Count 10 and acquitted him on Count 11 — transfers that were made the same day when the funds in the account had to be the same. *See* Record Excerpts at 53; Indictment at 20.

[21] Should this Court allow the convictions to stand on an aggregation of proof theory, then the Court should — at the very least — remand with

transferred funds were tainted only because it decided to pile on charges and indict Cheng on ten separate counts. The Fifth Circuit's opinion manifests nothing more than a *post hoc* attempt to correct the government's disadvantageous charging strategy. Once the government charged the transfers in ten separate counts, the government should have been absolutely precluded from aggregating them in order to satisfy an essential element of the offense, and then splitting them again to convict and punish. Fidelity to § 2314 and the due process clause requires no less.

II. THE FIFTH CIRCUIT'S AFFIRMANCE OF CHENG'S CONVICTIONS UNDER § 2314 WHEN THE ONLY EVIDENCE OF KNOWLEDGE AND CAUSATION OF THE TRANSPORTATION WAS CHENG'S BUSINESS OVERSIGHT OF A LARGE COMPANY IS AN ISSUE OF EXCEPTIONAL IMPORTANCE.

A. Cheng's Convictions Under § 2314 Violated His Constitutional Right to Due Process.

This Court in *Jackson v. Virginia*, 443 U.S. 307, 313-14 (1979), affirmed that "the due process standard recognized in *Winship* constitutionally protects an accused against a conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt." The Fifth Circuit rejected Cheng's argument that he neither knew nor caused the transfers of funds allegedly obtained by fraud, stating that "[v]iewed in the light most favorable to the verdict, the evidence established that Cheng oversaw the financial affairs of PRC[22] and was aware of the stock purchases. In this light, the evidence permits the

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instructions to the district court to resentence, treating the § 2314 convictions as one for the purposes of sentencing.

22 This conclusion itself rests upon multiple inferences: the evidence did *not* demonstrate that Cheng oversaw the financial affairs of PRC. Rather,

inference that he understood how those purchases would be paid for."[23] 9a. Such a conclusion disregards the overwhelming evidence contradicting the very point on which the Fifth Circuit states that an inference was reasonably drawn by the jury.

This Court has stated that "[a] permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Francis v. Franklin*, 471 U.S.307, 314-25 (1985) (citing *County Court of Ulster County, New York v. Allen*, 442 U.S. 157-63 (1979)); *see also Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960); *Tot v. United States*, 319 U.S. 463, 467 (1943). Moreover, as the trial court's instructions quoted in *Ulster* make clear,

> The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption and the presumption is said to disappear when such contradic-

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Cheng's testimony touched little if at all on his general knowledge of PRC's many financial transactions, focusing primarily on transactions relating to Ponte Vedra. S.R.28:67-75. Even if the government did prove that Cheng had a general working knowledge of PRC finances, no inference can be drawn that he actually knew of the source of funds for the stock purchases at issue. Ed Heath testified at trial to the magnitude of the PRC operation — at the time of the Ponte Vedra transaction, PRC operated the thirteenth largest real estate development business in the country, managing sixty properties in forty-seven cities and twenty-three states across the country, and employing thirty developers and over 800 staff members. S.R.29:149-152. Because of the magnitude of the operation, the overwhelming evidence that Cheng did not know of the funding for the stock purchases, and Kuhns's responsibility for the financial affairs of PRC, including the specific funding for these stock purchases, the Fifth Circuit's inference is wholly *unreasonable*.

[23] This theory was never presented to the jury — either in instructions or in the government's argument. Of course, if the government had evidence to show that Cheng knew of the stock purchases, surely it would have presented it at trial.

> tory evidence is adduced. . . . The presumption . . . may be rebutted by any evidence or lack of evidence in the case.

Ulster, id. at 161 n.20 (quoting trial court transcript at 743, 760). As shown below, the Fifth Circuit's conclusion that the jury could reasonable infer Cheng's knowledge (and implicitly causation) is not justified in light of the proven facts and, therefore, does not comport with due process.

In Cheng's case, there was no direct evidence that Cheng either knew, transported, or caused to be transported the funds allegedly obtained by fraud, as the government properly conceded in its appellate brief, G. Br. at 23, and the Fifth Circuit acknowledged in its opinion. 9a. Nor did the government introduce any evidence to rebut the following proof at trial: (1) that the PRC chief financial officer, *not* Cheng, had sole control and responsibility for choosing the funding source of the transfers, S.R.11:53; (2) that the chief financial officer had three accounts from which to choose, which allowed access to $28.3 million in untainted funds, S.R.28:75; (3) that Cheng's signature did not appear on any of the paperwork involving the wire transfers, S.R.11:59-70; and (4) that Cheng had no involvement in or knowledge that the transfers had occurred, much less the source from which they came, S.R.11:58;28:71. Equally significant is the government's failure to question Cheng whatsoever about his knowledge of, or role in, the transfers.

Ralph Kuhns, PRC's chief financial officer and a government witness, testified that he was solely responsible for determining how the stock purchases would be funded. S.R.11:53. He did not, and could not, testify that he had any communications with Cheng whatsoever that would contradict the evidence that Cheng had no knowledge of the stock purchases. Nor did the government produce any evidence to show that Kuhns was following a customary business practice to use the specific PRC account to fund the purchases. Kuhns could have funded the

stocks purchases from a brokerage account containing three million dollars in cash and securities or a fifteen million dollar PRC credit line with margin options. S.R.28:75. Thus, the *sole* piece of "evidence" that the government produced to support the Fifth Circuit's inference was Cheng's signature on the authorization form for the opening of the corporate trading account, which Kuhns testified was used during the same time period for purchases other than those at issue here. S.R.11:49,56. The government's failure of proof was not cured by the testimony of Kuhns, Cheng, Cheng's administrative assistant, or the treasurer of PRC.

This case does not present a situation in which there was a paucity of evidence on an element of an offense such that the only way to satisfy the proof standard was by drawing an inference. Rather, there was an abundance of evidence to the contrary, completely ignored by the Fifth Circuit, in violation of the standards articulated in *Francis* and *Jackson*. In short, the Fifth Circuit drew the inference it desired in order to uphold Cheng's four convictions on the § 2314 counts. Cheng's harsh sentence of ten years imprisonment on the § 2314 counts alone and thirty in total, meted out by a district court judge who stated he wanted to make an example out of Cheng and Heath for their purported role in the savings-and-loan crisis, should not rest on what amounts to no more than guessing by the courts.

B. The Inference Drawn by the Fifth Circuit Essentially Allowed Cheng to Be Convicted on the Impermissible Basis of Vicarious Criminal Liability.

By allowing Cheng's culpability to be determined by an inference drawn solely from his business oversight of a large company and general awareness of the business's stock purchases, the Fifth Circuit permitted Cheng to be convicted for vicarious criminal liability — a result clearly contrary to law.[24]

[24] The Fifth Circuit's decision, based upon a wobbling pyramid of inferences, also conflicts with the requirement that "while evidence of such

This issue itself is so important to the proper administration of federal criminal law and to the maintenance of stability in the commercial world that this Court should grant the writ of certiorari to the Fifth Circuit.

1. Section 2314 is not a criminal statute that permits the imposition of vicarious criminal liability.

Vicarious criminal liability is a legal concept that does not exist at common law. *United States v. United States Gypsum*, 438 U.S. 422, 437-38 (1978) ("We start with the familiar proposition that '[t]e existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'") (citations omitted). Rather, it must be expressly created by criminal statute. *Id.*; *People v. Jackson*, 440 N.W.2d 39, 41-42 (Mich. 1989). A vicarious criminal liability statute eliminates the requirement of a criminal act, and instead imputes the criminal act of another defendant. *State v. Beaudry*, 365 N.W.2d 593, 597 (Wis. 1985). In Cheng's case, § 2314 does not authorize such an imputation, but rather requires that the defendant personally possess the requisite knowledge and perform the criminal acts.

Both state and federal courts recognize that vicarious criminal liability cannot be imposed in a case like the one at bar. For example, the California Court of Appeal in *People v. Lieber*, 146 Cal. App. 2d Supp. 910, 914, 304 P.2d 869, 872 (Cal. App. Dep't. Super Ct. 1956), rejected the use of vicarious criminal liability as "unreasonable and indeed unconstitutional," and restated the rule that "an officer of a corporation is not criminally answerable for any act of a corporation in which he is not personally a participant." *Id.* Subsequently, the court in *People v. Regan*, 95 Cal. App. 3d Supp. 1, 4, 157 Cal. Rptr. 62, 63 (Cal.

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knowledge may be inferred from the particular circumstances and acts and conduct of the parties, . . . it must be clear and unequivocal." *United States v. Solomon*, 422 F.2d 1110, 1112 (7th Cir.), *cert. denied*, 399 U.S. 911 (1970) (citations omitted).

App. Dep't Super. Ct. 1979), rejected the attempt to use vicarious criminal liability, ruling that the District Attorney must present evidence of the defendant's "knowledge of or participation in" the alleged illegal act in order to convict. The court in *Regan* rejected as "untenable" the District Attorney's argument that the factfinder may infer knowledge or approval on the part of the defendant. *Id.* In Cheng's case, the Fifth Circuit pointed to no evidence that Congress has abrogated the requirement of § 2314 that the defendant transport the items with knowledge that they are fraudulently obtained.

These cases, which reject the imposition of vicarious criminal liability absent explicit statutory authorization, track the cogent reasoning of Justice Murphy, who dissented from the majority decision in *United States v. Dotterweich*, 320 U.S. 277, 285-93 (1943). The Court in *Dotterweich* affirmed the imposition of vicarious *misdemeanor* criminal liability on the corporate president for violations of the Federal Food, Drug and Cosmetic Act. Justice Murphy aptly stated,

> There is no evidence of any personal guilt on the part of the respondent. There is no proof or claim that he ever knew of the introduction into commerce of the adulterated drugs in question, much less that he actively participated in their introduction. Guilt is imputed to the respondent solely on the basis of his authority and responsibility as president and general manager of the corporation.
>
> It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who, like the respondent, has no evil intention or consciousness of wrongdoing. It may be proper to charge him with responsibility to the corporation and the stockholders for negligence and mismanagement. But in the absence of clear statutory authorization it is inconsistent

> with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge.

Dotterweich, 320 U.S. at 285-86 (Murphy, J., dissenting). Subsequent courts echo Justice Murphy's reasoning in deciding not to impose vicarious felony criminal liability. Because § 2314 does not provide the requisite authorization, the Fifth Circuit's inference imposing vicarious criminal liability fails as a matter of law.

2. Imposition of vicarious criminal liability is especially egregious in a case, like the instant one, where the penalty is substantial imprisonment.

The use of a theory of vicarious criminal liability to impose severe criminal penalties exacerbates the affront to Cheng's due process rights. It is a "universal doctrine" of American criminal law that the prosecutor must prove the union of a criminal act and a criminal intent in order to convict the defendant. *Morissette v. United States*, 342 U.S. 246, 251 (1952). In the latter half of this century, however, courts have recognized a class of offenses that do not require criminal intent. *Id.* at 253-56. As this Court noted in *United States v. United States Gypsum*, 438 U.S. 422, 437-38 (1978), "the limited circumstances in which Congress has created and the Court has recognized such offenses . . . attest to their generally disfavored status." Thus, they are applied in limited circumstances:[25]

> These offenses usually involve light penalties and no moral obloquy or damage to reputation. Although criminal sanctions are relied upon, the primary pur-

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[25] Commentators LaFave and Scott agree: "To the extent that vicarious liability can be justified in the criminal law, it should not be utilized to bring about the type of moral condemnation which is implicit when a sentence of imprisonment is imposed." LaFave & Scott, *Criminal Law* § 3.9 at 255 (1986).

> pose of the statute is regulation rather than punishment or correction. The offenses are not crimes in the orthodox sense, and wrongful intent is not required in the interest of enforcement.

People v. Vogel, 46 Cal. 2d 798, 801 n.2, 299 P.2d 850, 853 n.2 (Cal. 1956). *See also Morissette*, 342 U.S. at 256. The potential penalty under § 2314 is ten years and/or a fine of $10,000 for each count.[26] Moreover, the charged offenses have clearly damaged Cheng's reputation. By charging Cheng with ten § 2314 offenses, the government indisputably intended to punish Cheng severely.

3. Imposition of Vicarious Criminal Liability on Cheng Violated the Ex Post Facto Clause.

The United States Constitution prohibits the enactment of ex post facto laws. U.S. Const. Art I, § 9. This prohibition applies not only to legislatures, but also to courts through the due process clause of the Fifth and Fourteenth Amendments. *Marks v. United States*, 430 U.S. 188, 193 (1977). This Court has held that novel judicial construction of an existing statute operates as prohibited a ex post facto law:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely as Art. I, § 10,[27] of the Constitution forbids . . . . If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which

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[26] In Cheng's case, having been charged with ten counts of § 2314, his sentencing exposure was one hundred years imprisonment and/or $100,000 in fines — an obviously punitive possibility.

[27] Article I, Section Ten, of the Constitution, governing the states' conduct, is the identical counterpart to Article I, Section Nine, of the Constitution prohibiting the federal government from enacting ex post facto laws.

> had been expressed prior to the conduct in issue,' it must not be given retroactive effect.

Bouie v. Columbia, 378 U.S. 347, 353-54 (1964). The Fifth Circuit's decision is indefensible and unexpected because it is contrary to the express language of § 2314, and runs counter to accepted jurisprudence. Cheng neither committed the act of transferring the funds obtained by fraud, caused the act to be committed, nor had the requisite criminal intent to commit the act. Thus, judicial enlargement of § 2314 in the manner advanced by the Fifth Circuit violated Cheng's due process right under the Fifth Amendment.

4. Countenance of the Imposition of Vicarious Criminal Liability on Corporate Heads Like Cheng Will Chill the Legitimate Conduct of Corporate Executives.

A chill wind should blow through the commercial world from the convictions of Cheng on the basis of vicarious criminal liability. In essence, Cheng, one of PRC's corporate heads, is being held criminally responsible for the actions of his subordinates of which he had no knowledge and which he neither caused, directed, or otherwise controlled. PRC had hired Ralph Kuhns as chief financial officer for the thirteenth-largest real estate company in the nation and delegated significant concomitant responsibility to him. *See* S.R.11:87. Such a delegation is crucial to the smooth functioning of a large business organization; without it, the corporate heads will be unable to manage effectively.

The Fifth Circuit's decision opens the door to imposing career-destroying prison sentences — *felony* criminal liability — for the business oversight and responsible role a person exercises in his company. Arguably, the higher one rises in his or her corporation, the greater the number of subordinates the person supervises and thus the greater the risk that he or she will

be held criminally responsible for the actions of his or her subordinates. The Fifth Circuit's wayward opinion raises serious implications for corporate conduct that this Court should rectify.

CONCLUSION

The government's abject lack of evidence on the § 2314 charges explains why the Fifth Circuit felt compelled to aggregate proof for conduct charged in ten separate offenses, and to conclude that the evidence supported an inference of criminal intent based upon Cheng's business oversight and putative knowledge of the stock purchases. However, neither a lack of evidence nor a desire to convict at all costs justifies either the rewriting of the law of the United States or the violation of the United States Constitution. Accordingly, this Court should grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 91-1112

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

SIMON EDWARD HEATH and PAUL SAU-KI CHENG,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Texas

Before HIGGINBOTHAM, and DUHE, Circuit Judges and HUNTER, District Judge.[1]

DUHE, Circuit Judge:

Defendants-Appellants Simon Heath and Paul Cheng were convicted of numerous counts of bank fraud, wire fraud, misapplication of funds, false entries, and interstate transportation of funds obtained by fraud. They seek reversal of their convictions. Because we find two counts of the indictment multiplicitous, we remand in part. The remaining convictions are affirmed.

BACKGROUND

Cheng and Heath were founding partners of Pacific Realty Corporation (PRC), a large national real estate development company. In 1984, PRC and Cheng and Heath, individually, acquired Guaranty Federal Savings & Loan, a Dallas savings

[1] Senior District Judge of the Western District of Louisiana, sitting by designation.

and loan then in receivership. The purchase agreement contained a forbearance clause exempting Guaranty from banking regulations that prohibit loans to insiders. Thus, Guaranty was authorized to loan money to PRC and its clients.

Soon after requiring Guaranty, PRC bought forty-two acres of land in Florida for development. Problems occurred, however, when the local government imposed a sewer moratorium. At the same time, the company with which PRC had planned to develop the land withdrew from the deal. Cheng and Heath then tried to sell the land, but were unsuccessful.

In December 1985, Cheng and Heath made a deal with Don Farris, of the Don Companies, an Arizona real estate development company. Farris, a major borrower of Guaranty, was to buy almost thirty acres of the Florida property for $10 million with money loaned to him by Guaranty. The loan would be non-recourse and collateralized solely by the Florida property. Farris would then establish a $2 million reserve account to pay interest on the loan, funded with proceeds from the sale to PRC of property he owned in Arizona. PRC agreed to buy the Arizona property with $3.3 million loaned to it by Guaranty and secured solely by the property.

The $10 million loan from Guaranty to Farris required a loan-to-property value ratio of ninety percent. For the deal to be successful, therefore, the Florida property had to be appraised at $11 million, more than twice the value quoted to Cheng and Heath during their earlier unsuccessful attempts to sell the property. In an effort to obtain such a favorable appraisal, Heath, in the presence of Cheng and another PRC employee, directed Ben Romero, an officer of PRC, to secure an appraisal on an "as built basis" by informing the appraisers that twin highrise apartment towers would be built on the land. At the time, Cheng and Heath had no intention of actually building the highrises. Based on this misrepresentation, Romero obtained a preliminary opinion letter from Marshall & Stevens, a Chicago

appraisal firm, appraising the full 42.40 acres at $11.2 million. Marshall & Stevens was not aware that its preliminary letter was going to be used to close the Guaranty/Farris loans, and the letter was technically deficient for such purposes. Using this letter, however, PRC and Farris closed the deal on January 17, 1986. On January 18, at Cheng and Heath's request, Marshall & Stevens sent PRC a corrected back dated letter, addressed to Guaranty and appraising only the thirty acres of property sold to Farris.

Although it corrected its original letter, Marshall & Stevens did not immediately provide Guaranty with the necessary full narrative appraisal because it was unable to verify its initial $11.2 million estimate. In light of the zoning laws and sewer moratorium, one Marshall & Steven's appraiser suggested that the Florida property was worth less than half of the $11.2 million evaluation. In the meantime, in March 1986, the Federal Home Loan Bank (FHLB) discovered that the loan had been made without the required full narrative appraisal.

To provide Marshall & Stevens with a factual basis for the $11.2 million figure, Romero made to them specific false representations about the development potential of the Florida property, including assurances that sewer and treatment facilities were available, that the density of the purported twin towers was permissible under current zoning, and that it was physically possible to build the highrises on the land. Based on these misrepresentations, Marshall & Stevens completed the full narrative appraisal for $11.2 million.

For their participation in the scheme, the Government brought a seventeen count indictment against Cheng and Heath. Count one alleged conspiracy, counts two and three alleged bank fraud based on the loans for $10 million and $3 million procured from Guaranty. Counts four through seven alleged wire fraud, misapplication of funds, and false entries. The final ten counts were for interstate transportation of funds obtained by fraud,

based on Cheng and Heath's use of funds obtained through the Florida deal to purchase stock from a New York broker.

ANALYSIS

Together, the Defendants attack their convictions on many grounds. Initially, they charge that the indictment was multiplicitous with regard to the two bank fraud charges stemming from a single transaction. Next they attack the sufficiency of the evidence on all counts, asserting that the evidence did not support the finding of fraud necessary to each count. They also claim that their convictions for interstate transportation of fraudulently obtained funds fail because the Government did not prove that each individual transfer involved proceeds a fraudulent transaction. Finally, they cite numerous trial errors, including prosecutorial misconduct, mistakes in the district court's evidentiary rulings, and flaws in the district court's instructions to the jury.

I. Indictment Multiplicity

"'Multiplicity' is charging a single offense in more than one count of an indictment." *United States v. Lemons*, 941 F.2d 309, 317 (5th Cir. 1991). The Defendants argue that Counts 2 and 3 of their indictments, which charged them with bank fraud under 18 U.S.C. § 1344, are multiplicitous in that each of the counts seeks to punish them for participation in the same scheme against Guaranty. The Government counters that each transaction, the $3.3 million Phoenix loan and the $10 million Florida loan, must be viewed as subjecting Guaranty to separate risks of loss, giving rise to multiple liability under the statute.

In *Lemons*, we stated that "the bank fraud statute imposes punishment only for each execution of the scheme." *Id.* at 318. Thus, unlike the mail or wire fraud statutes, the bank fraud statute does not allow punishment for each *act* in execution of a scheme or artifice to defraud. *Id.* Although we so interpreted the bank fraud statute, we expressly declined to hold that "the

execution of a scheme cannot result in the imposition of multiple liability . . . ." *Id.* n.6. Our note specifically referred to *United States v. Farmigoni*, 934 F.2d 63 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1160 (1992). *Farmigoni*, in contrast to this case and *Lemons*, involved a scheme to defraud two different banks, giving rise to prosecution in each of the banks' home states. Although both indictments in *Farmigoni* arose from the same scheme, "neither require[d] proof of intent to defraud the other unnamed financial institution." *Id.* at 66. The instant scheme involves intent to defraud only one bank, Guaranty, albeit by procuring two loans. The two loans, however, were integrally related; one could not have succeeded without the other. Indeed, the sale of the Phoenix property was conceived for the sole purpose of facilitating the Florida sale.

Although a two-loan scheme may subject an institution to greater risk than a scheme involving only one transaction, it is the execution of the scheme itself that subjects a defendant to criminal liability, not, as we stated in *Lemons*, the execution of each step or transaction in furtherance of the scheme. Because the Defendants' indictments sought to punish them for execution of the multiple steps involved in the scheme, the counts are multiplicitous. Therefore, we remand the case with the instruction to the Government to choose the count it wishes to leave in effect. The district court then should vacate the convictions on the remaining count and resentence Heath and Cheng. *See United States v. Saks*, 964 F.2d 1514, 1526 (5th Cir. 1992); *United States v. Moody*, 923 F.2d 341, 347-48 (5th Cir.), *cert denied*, 112 S. Ct. 80 (1991).

II. Sufficiency of the Evidence

Convictions must be affirmed if the evidence, viewed in the light most favorable to the verdict, with all reasonable inferences and credibility choices made in support of it, is such that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v.*

Virginia, 443 U.S. 307, 319 (1979); *United States v. Kim*, 884 F.2d 189, 192 (5th Cir. 1989). In making this determination, we need not exclude every reasonable hypothesis of innocence. *United States v. Henry*, 849 F.2d 1534, 1536 (5th Cir. 1988). Juries are free to use their common sense and apply common knowledge, observation, and experience gained in the ordinary affairs of life when giving effect to the inferences that may reasonably be drawn from the evidence. *United States v. Cruz-Valdez*, 773 F.2d 1541, 1546-47 (11th Cir. 1985)(en banc), *cert denied*, 475 U.S. 1049 (1986).

A. Fraud

Each of the fraud-based charges relies on the twin highrise apartment tower statement used in the Marshall & Stevens appraisal. The Defendants contend that the statement was not a material misrepresentation and, therefore, could not support their convictions. They suggest that representations that should have no effect on the party to whom they are made, no matter how intentional, cannot be material. In other words, because Marshall & Stevens had a professional duty to independently investigate the highest and best use of the Florida land, the owners' plans for development could not influence the appraisal, and, therefore, are immaterial to the appraisal.

The Government responds that despite the appraisers' ethical duty, the twin tower statement was made with the intent to influence the appraisal and did, in fact, do just that. Implicit in the highrise description, the Government argues, is a representation of density per acre. This particular physical plan, the Government explains, was the only one that could sustain the density supporting the valuation, as well as zoning requirements, such as parking and green spaces.

A statement is material if it "has a natural tendency to influence, or was capable of influencing the decision of" the lending institution. *Kungys v. United States*, 485 U.S. 759, 770 (1988); *Theron v. United States Marshal*, 832 F.2d 492, 496-97

(9th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988). The high-rise misrepresentation was necessary to the $11.2 million appraisal which, in turn, was necessary to PRC's procuring the loan from Guaranty. We conclude, therefore, that the statement was material to Guaranty's decision. Proof that Romero made the misrepresentations at Heath and Cheng's bequest, therefore, was sufficient to support their fraud-based convictions.

B. Individual Transfers

The Defendants argue that their convictions for interstate transportation of funds obtained by fraud should be reversed because the Government failed to prove beyond a reasonable doubt that any individual transfer involved the proceeds of the illegal deal. The proceeds of the fraudulent transaction were commingled with over $700,000 of untainted money. Because none of the transfers named in the indictment exceeded $700,000, the Defendants contend, none necessarily involved funds obtained by fraud. In the aggregate, the transfers listed in the indictment well exceeded $700,000.

In *United States v. Poole*, 557 F.2d 531 (5th Cir. 1977), we reversed a defendant's conviction for interstate transportation of funds obtained by fraud because his account contained enough untainted funds to pay the check in question without using the funds obtained fraudulently. *Id.* at 535-36. We noted specifically, however, that we were not confronted with the issue present here, that is, the situation in which there are insufficient untainted funds to cover all the checks in question. *Id.* at 536 n.8.

In *United States v. Levy*, 579 F.2d 1332 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979), we addressed that question, affirming the defendant's conviction although he had mingled legitimately obtained funds with those obtained by fraud. *Levy* differs from the instant case, however, in that each check written exceeded the amount of clean funds. *Id.* at 1334, 1337.

The Defendants, focussing on each transfer in isolation, insist that *Poole*, not *Levy*, applies because there were clean funds sufficient to cover each transfer. To view each transaction in isolation, however, would defeat the purposes of the statute, allowing sophisticated criminals "to spirit stolen funds from one state to another," *Levy*, 579 F.2d 1337, so long as each check written did not exceed the amount of legitimate funds on hand in the bank account. "[A] criminal statute should be fairly construed in accordance with the legislative purpose behind its enactment." *Levy*, 579 F.2d at 1337 (citing *United States v. Turley*, 352 U.S. 407 (1957)). We thus decline to extend *Poole* to the case at hand.

The Government established that Heath and Cheng deposited $6,053,204.93 of loan proceeds into an account containing $454,518.49 of untainted funds. In that account, the Defendants placed an additional $332,162.50 of clean funds, and the bank contributed interest totalling $12,600.56. Thus, the Government proved that between January 21, 1986 and February 25, 1986, the account held $6,053,204.93 tainted funds and $799,281.55 clean funds (counting all of the interest paid as clean). By February 4, the date of the first transfer cited in the indictment, the Defendants had reduced the account balance to $3,988,519. From this amount, they transferred a total of $2,155,508 to a New York broker. Even assuming that none of the clean funds were removed before February 4, it is obvious that the $799,281.55 could not have covered all of the transfers to New York. At least $1,356,126.45 in tainted funds was transferred to New York. It defies logic to require that the Government trace these tainted funds through each transfer. Such proof is impossible because money is fungible. *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1158 (2d Cir. 1986). The impossibility of such proof, however, does not render the convictions invalid. We are satisfied that, having proved beyond a reasonable doubt that the aggregate taken from

the account exceeded the amount of clean funds available, the Government met its burden.

Moreover, we are unpersuaded by Defendant Cheng's contentions that the Government failed to prove that he had knowledge of the transfers. Viewed in the light most favorable to the verdict, the evidence established that Cheng oversaw the financial affairs of PRC and was aware of the stock purchases. In this light, the evidence permits the inference that he understood how those purchases would be paid for.

III. Trial Errors

A. Prosecutorial Misconduct

During the trial, the Government questioned several witnesses about the use of the Florida property following the sale to Farris. The Defendants contend that these questions exceeded the limits imposed by the district court on testimony regarding the status of the land after the closing. The Government notes, however, that the district court limited testimony regarding only the *value* of the Florida property, not all subjects having to do with it. It argues that its questions were relevant to show the control exercised over the property by the Defendants and their continued efforts to develop and sell the property to prove that the sale to Farris was a sham warehousing transaction.

The trial court specifically restricted testimony regarding the value of the property to a six month period surrounding closing. The court, however, declined to adopt a similar rule for evidence of development, deciding instead to rule on such evidence on a case-by-case basis. Nonetheless, the court requested that the Government not ask open-ended questions of the witnesses on that subject. After careful review of the Government's questions, we find no violation of the guidelines set by the district court.

The Defendants next argue that the prosecutors tainted the trial by deliberately eliciting inflammatory hearsay statements

from Scott Smith, Vice President and Senior Loan Officer of Guaranty during redirect examination by the Government. During Smith's cross-examination, the Defendants inquired whether the Florida loan had aroused Smith's attention in any way. On redirect, the Government pursued this line of questioning, asking whether Smith had reported the loan to any of his senior officers. Smith testified, "I told Mr. Thompson that there was some concern being voiced about the loan, that it may be a sham loan to get money into Pacific Realty." Defense counsel immediately objected, and the court retired the jury. When the jurors returned, they were instructed to ignore the last of Smith's statements because it was hearsay.

We disagree with the district court's description of the statements. Hearsay "is a statement, other than one made by the declarant while testifying at trail or hearing, offered to prove the truth of the matter asserted." Fed.R.Evid. 801(c). Smith's statement was not offered to show that the loan was a sham, but to reveal whether the loan had aroused his suspicions and whether Smith had notified any other bank office about it. It was not hearsay, and its introduction, therefore, did not constitute reversible error. Finally, the Defendants complain that several statements made by the prosecutor in closing argument were wholly frivolous and prejudicial. Specifically, the Defendants point to several instances when the prosecutor allegedly vouched for a Government witness. They also refer to the prosecutor's remarks about the Defendants' failure to explain the twin tower concept. And, last, the Defendants allege that the prosecutor implied that they should be punished for violations of civil regulations as well as criminal statutes. We find none of these arguments persuasive.

The Government's remarks about Mr. Kuhn's (sic – should be Smith's) testimony merely pointed out that the Defendants' attacks on his credibility were unsuccessful. The statements do not rise to the level of vouching, most often described by this

Court as "explicit personal assurances of the witnesses veracity." *United States v. Binker*, 795 F.2d 1218, 1224 (5th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987). The Government's references in rebuttal to the Defendants' failure to explain the twin tower concept similarly identified holes in the Defendants' defense theory, in this instance, by pinpointing a weakness in their evidence. Finally, a review of the record does not reveal an attempt by the prosecutor to imply that violations of civil regulations should lead the jury to punish the Defendants. Rather, the prosecutor's unspecific reference to "rules and regulation" was made as part of an expansive illustration of the Defendants' general disrespect for the law.

B. Evidentiary Rulings.

1. Kuhn Testimony

The trial court limited the testimony of one of the Defendants' allegedly key witnesses, Michael Kuhn, a real estate lawyer, who would have testified about the use of non-recourse loans to execute real estate deals. The trial court limited the testimony because Kuhn would be "testifying to his own experience and impressions," leaving the Government no means to question his accuracy. The court further stated that Kuhn's testimony on the subject was impermissible because "there [were] no partial studies, no statistics from which would give rise to any reliable inferences. No testing the accuracy of the witness's opinion."

Rule 702 of the Federal Rules of Evidence permits one "qualified as an expert by knowledge, skill, experience, training, or education" to testify when his "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact issue." Fed.R.Evid. 702. As a general rule, "questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than the admissibility and should be left for the jury's consideration." *Viterbo v. Dow Chem. Co.*, 826 F.2d 420,422 (5th Cir. 1987). We find

that in light of these rules, the limitation of Kuhn's testimony was in error. Kuhn had specialized knowledge and experience in the field of real estate closings, which were beyond the knowledge and skills of the jurors. The absence of scientific data supporting his opinions went to the weight the jury should have accorded them. The error, however, was harmless.

Information about non-recourse loans was available from other witnesses. The limitation of Mr. Kuhn's testimony, therefore, did no so hamper the Defendants' ability to present their defense as to mandate reversal of their convictions.

2. Romero Rehabilitation

The Defendants wished to examine Michael Carnes, the lawyer representing Ben Romero, a key participant in the appraisal scheme. The Defendants proffered Carnes in an attempt to rehabilitate Romero's credibility, which the Government had attacked by introducing prior inconsistent statements made by Romero before the grand jury following his plea agreement with the Government. Carnes was to testify about the tactics used by the Government allegedly to coerce Romero into pleading guilty. The district court, however, correctly excluded Carnes's testimony because it was not probative of Romero's inconsistencies or impeachment.

Rule 613(b) of the Federal Rules of Evidence requires that a witness be "afforded an opportunity to explain or deny" inconsistent statements proven by extrinsic evidence. It does not mandate the examination of corroborating witnesses. To the contrary, it is within the trial court's broad discretion to set reasonable limits on rehabilitative testimony to prevent the trial from meandering off into collateral matters. *Beck v. United States*, 317 F.2d 865, 870 (5th Cir. 1963), *cert. denied*, 376 U.S. 972 (1964).

C. Instructions

1. *Allen* Charge

After the jury deliberated for seven days, it informed the court that it was deadlocked. The court then read the jury an *Allen* charge[2], but, over counsel's objections, omitted from the charge language that the court believed coercive. In particular, the district court omitted language encouraging the "majority" and "minority" to reconsider their positions. It also failed to repeat that the jury should not convict unless convinced of the Defendants guilt beyond a reasonable doubt. The first omission, the Defendants argue, had a coercive effect on the jury. The second eliminated an essential reminder about the Government's burden of proof.

We review *Allen* charges for compliance with two requirements: "'(1) the semantic deviation from approved *Allen* charges cannot be so prejudicial as to require reversal, and (2) he circumstances surrounding the giving of an approved *Allen* charge must not be coercive.'" *United States v. Lindell*, 881 F.2d 1313, 1321 (5th Cir. 1989)(quoting *United States v. Bottom*, 638 F.2d 781, 787 (5th Cir. Unit B Mar. 1981)), *cert. denied*, 493 U.S. 1087 and 496 U.S. 926 (1990). The district court is given broad discretion to determine whether an *Allen* charge might coerce a jury. *United States v. Reeves*, 892 F.2d 1223, 1229 (5th Cir. 1990).

In light of the complexity of the case, the sophistication of the bank fraud scheme, and the length of the indictment, the court did not err in giving the jury an *Allen* charge rather than declaring a mistrial. *See Lindell*, 881 F.2d at 1321. Although the court deviated from the Fifth Circuit's suggested *Allen* charge, the modification was not so significant as to coerce the

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[2] "*Allen*" refers to *Allen v. United States*, 164 U.S. 492 (1896). The term describes supplemental instructions urging jurors to forego their differences and reach a unanimous verdict.

jury to reach its verdict. Although the court did not address the jurors in terms of majority and minority, it did properly instruct all of them to reconsider their opinions, but not to "surrender a conscientiously held conviction merely to reach a verdict." The Defendants' contention that the jury's continued deliberation is proof of the coercive effect of the instruction does not convince us otherwise. We note, in fact, that the jury's verdict was a discriminating one — after further deliberation, the jury remained deadlocked on two counts and acquitted the other Defendants of several others.

Nor do we find omission of the reasonable doubt language to be reversible error. The jury was reminded at least thirty-five times in the court's final jury charges that the Government had to prove the elements of the crimes beyond a reasonable doubt. It also was informed of this burden of proof during the jury selection and closing arguments. Additionally, the court provided the jurors with a written copy of the final charges during deliberations. In light of these constant reminders of the Government's burden, we conclude that the omission of the reasonable doubt language from the *Allen* charge does not require the reversal of the Defendants' convictions.

2. Literal Truth

The Defendants claim that they were entitled to a charge instructing the jury that if the appraisal represented the literal truth, they could not be found guilty of making false entries for the purpose of 18 U.S.C. § 1006. The underlying foundation of the Defendants' argument, however, misconstrues the law. "The prohibition of false entries by [section 1006] is in broad and comprehensive terms." *United States v. Meyer*, 266 F.2d 747, 754 (5th Cir.), *cert. denied*, 361 U.S. 857 (1959). Mr. Justice Cardozo, in describing 12 U.S.C. § 592, a forerunner of the modern bank fraud statutes, defined false entries to include "any entry on the books of the [institution] which is intentionally made to represent what is not true or does not exist, with the

intent to deceive [the institution's] officers or to defraud the association." *United States v. Darby*, 289 U.S. 224, 226 (1933)(quoting *Agnew v. United States*, 165 U.S. 36, 52 (1897)).

The appraisal entered by Cheng and Heath on the Guaranty books was prepared by professional appraisers and revealed the false assumptions on which it is based, but its purpose was to represent to Guaranty that the Florida property was worth $11.2 million because highrise apartment towers would be built on it. That representation is not true; the plan to build the highrise towers did not exist at the time the appraisal was entered. The entry of the appraisal based on knowingly false assumptions with the intent to defraud Guaranty falls well within the terms of section 1006. The court, therefore, did not err in rejecting the "literal truth" instruction proffered by the defense.

3. Good Faith Defense

After lengthy discussions about the Defendants' request for an instruction explaining their good faith defense, the court instructed the jury that "one who acts with honest intent is not chargeable with intent to defraud." The Defendants contend that the word "chargeable" as used in the instruction eliminated their entire defense, in effect telling the jury that the Defendants could not have acted in good faith because they in fact had been "charged" with the offenses.

The Government notes that despite the debate in the trial court surrounding this instruction, the Defendants did not raise this point of error. A party may not state one ground when objecting to an instruction and attempt to rely on a different ground for the objection on appeal. 9 Charles A. Wright and Arthur Miller, § 2554 at 647; *Palmer v. Hoffman*, 318 U.S. 109, 119 (1943). Our review of this claim, therefore, is limited to plain error.

Although subject to the interpretation now suggested by the Defendants, it is not obvious to us that the word "chargeable"

in the present context would so confuse the jurors. Inartful as the court's choice of words may have been, it does not rise to the level of plain error.

4. Expansion of the Indictment

The Defendants next object that the court's instructions regarding false entry and misapplication of funds permitted the jury to find them guilty for acts not charged in the indictment. First, they argue that because the indictment referred to the Defendants as officers, directors, and shareholders only, the court erred when it instructed the jury that the Defendants were responsible for their actions as "officer[s], agent[s], or employee[s] of or connected in any capacity with" the institution. The Defendants objected to the instruction in the district court, but they did not do so on the ground that the instruction expanded the indictment. Thus, we review for plain error only.

The trial court's instruction does not amount to plain error. The court first read the indictment, referring to the Defendants as officers directors, and shareholders of Guaranty. It then read the applicable statutes to the jury, both of which apply to "officer[s], agent[s], or employee[s] of or connected in any capacity with" the institution. 18 U.S.C. §§ 675 & 1006. Then the court listed the elements of the offenses, repeating, as the first element of each, the requirement that the Defendants be "officer[s], agent[s] or employee[s]."

To the extent that the instructions mandated this finding, they were unnecessary because the parties had stipulated that the Defendants were directors of Guaranty. Though superfluous, the instructions did not expand the indictment to allow the jury to convict the Defendants for actions taken in a capacity other than officer or director.

The Defendants next contest the court's charge regarding materiality. They argue that by instructing the jury that entry of the appraisal was material, rather than that the false highrise

statement was material, it permitted the jury to convict them based on any false statement contained on the appraisal, whether made by them or not. The Defendants properly objected on these grounds in the district court.

We review a jury instruction to determine whether "'the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them.'" *United States v. Stacey*, 896 F.2d 75, 77 (5th Cir. 1990)(quoting *United States v. August*, 835 F. 2d 76, 77 (5th Cir. 1987)). "A trial judge is given substantial latitude in tailoring the instructions so long as they fairly and adequately cover the issues presented." *United States v. Pool*, 660 F.2d 547, 558 (5th Cir. Unit B Nov. 1981).

The court's instruction on false entries properly advised the jury of the charges pending against the Defendants and the elements of those crimes. The potential for confusion arising from the court's reference to materiality does not negate this finding. The court specifically instructed that the indictment charged only the highrise statement to Defendants. S.R. 33, p. 55. We are satisfied, therefore, that as a whole, the instruction fairly and adequately informed the jury of the pertinent issues.

5. Clean Funds

The Defendants finally claim that they were entitled to a charge that if there were untainted funds in their account sufficient to cover each of the alleged interstate transfers, then the jury should find the Defendants not guilty of interstate transfer of funds obtained by fraud. As the discussion above explains, *supra* II. B., this requested instruction does not accurately reflect the law.

CONCLUSION

Because counts 2 and 3 of the Defendants' indictments are multiplicitous, we REMAND the case for dismissal of one count and resentencing. The remaining convictions are AFFIRMED.

REMANDED WITH INSTRUCTIONS AND AFFIRMED IN PART.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1112

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SIMON EDWARD HEATH and
PAUL SAU-KI HENG,
Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion 08-20-92, 5 Cir., 1992, ____ F.2d ____)

(September 29, 1992)

Before HIGGINBOTHAM and DUHE, Circuit Judges and HUNTER*, District Judge.

*Senior District Judge of the Western District of Louisiana, sitting by designation.

PER CURIAM:

(x) The petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the

Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

[John M. Duhe, Jr.]
United States Circuit Judge

APPENDIX C

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

Simon Edward HEATH and Paul Sau-Ki CHENG,
Defendants-Appellants.

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Opinion Aug. 20,1992, 5 Cir., 1992, 970 F.2d 1397)

Before HIGGINBOTHAM and DUHE, Circuit Judges and HUNTER, District Judge.[1]

DUHE, Circuit Judge:

Sua sponte we enter this supplemental order on Defendants-Appellants' argument that the trial court constructively amended the indictment. Defendants contend that the decision of this panel is in conflict with *United States v. Salinas*, 601 F.2d 1279 (5th Cir. 1979). We disagree. Assuming without deciding that it was error for the district court to refer in jury charges to "officers, agents or employees" when the indictment charged Defendants as "officers, directors and shareholders," we nevertheless deny rehearing for the following reasons.

First, Defendants did not object in the trial court to the jury charge on this ground. Therefore, contrary to Salinas where this specific objection was made, we review for plain error only. The Salinas court was not restricted to the plain error standard. An error in a charge is plain when, considering the evidence and the charge as a whole, "there is a likelihood of a grave miscarriage of justice." *U.S. v. Sellers*, 926 F.2d 410, 417 (5th Cir. 1991). A miscarriage of justice is unlikely here, because Defendants

[1] Senior District Judge of the Western District of Louisiana, sitting by designation.

stipulated that they were directors of the bank. The court informed the jury about that stipulation as part of the charge. No such stipulation in *Salinas* definitively established the defendants' relationship to the bank. While it was possible in *Salinas* for defendants to have been convicted in the wrong capacity, that could not happen here due to the stipulation.

Second, the Salinas panel found a trial court violation of Rule 30 of the Federal Rules of Criminal Procedure which was closely connected to the capacity issue. We have no Rule 30 violation in this case.

Finally, Salinas predates the Supreme Court's 1986 decision that error in an instruction on an essential element of an offense can be harmless. *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986); see also *Carella v. California*, 491 U.S. 263, 266-68, 109 S.Ct. 2419, 2421, 105 L.Ed.2d 218 (1989); *Pope v. Illinois*, 481 U.S. 497, 503 n.7, 107 S.Ct. 1918, 1922, 95 L.Ed.2d 439 (1987). In view of the stipulation that Defendants were directors of the bank, any error would be harmless.

Rehearing has therefore been DENIED. No Judge in regular active service having requested that the Court be polled on rehearing en banc, the Suggestion for Rehearing En Banc has been DENIED.

[November 19, 1992]